United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7012

- -

WILLIAM McQUILLAN,

Plaintiff-Appellant,

-against-

"ITALIA" SOCIETA PER AZIONE DI NAVIGAZIONE,

Defendant-Appellee.

- -

B P/S

PETITION FOR RE-HEARING AND

PETITION FOR RE-HEARING EN BANC

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STATEMENT

This is a petition for re-hearing and request for re-hearing EN BANC of the decision of this Court (Hons.W.Feinberg, W.H.Timbers, E.A.Van Graafeiland,CCJ.) rendered May 9, 1975, affirming a judgment of the District Court of the Southern District of New York, affirmed on the opinion of Hon. Henry Werker, D.J., reported at 386 F.Supp.462.

It is respectfully submitted that the decision of this Court is in direct conflict with the prevailing law of this Circuit and the prevailing law of the United States Supreme Court and completely omits any mention of the crucial arguments of Plaintiff-Appellant. We respectfully request Re-hearing on the issues apparently not considered or overlooked and Re-hearing EN BANC where there is conflict among the various panels of this Court and the United States Supreme Court and where there are issues of such significance as should be considered by the entire Bench of this Court.

The points "overlooked or mis-apprehended" by this Court,(Fed.R.Proc. R.40.a),in appellant's humble opinion, are:

I. THE RUBRIC OR NOTICE ON THE FACE OF THE TICKET COMPLETELY FAILED TO INCORPORATE BY REFERENCE ANY OTHER TERMS OR CONDITIONS CONTAINED ELSEWHERE IN THE PASSAGE BOOKLET BY REASON OF THE FACT THAT IT WAS PRINTED IN SUCH MINISCULE SIZE, MANNER AND FORMAT THAT IT FAILED TO WARN AND GIVE McQUILLAN FAIR AND ADEQUATE NOTICE OF PURPORTED INCORPORATION.

II. SUMMARY JUDGMENT SHOULD BE DENIED WHERE A BONA FIDE MATERIAL ISSUE OF FACT EXISTS; WHERE THE SLIGHTEST DOUBT EXISTS AS TO A TRIABLE ISSUE OF FACT; AND WHERE THE MOVING PARTY HAS NOT SUSTAINED THE BURDEN OF SHOWING THERE ARE NO ISSUES OF FACT REQUIRING A TRIAL.

III. DEFANDANT IS ESTOPPED BY ITS CONDUCT FROM CLAIMING THE PROTECTION OF ITS PURPORTED TIME LIMITATION CLAUSE.

To avoid encumbering this petition with lengthy quotations of authorities cited in my original brief I shall respectfully refer this Court to appropriate pages therein where ever I cite such cases.

This Court has apparently "overlooked or mis-apprehended the crucial issue of "What constitutes the contract proper between the parties?" If"we keep our eye on the ball !" i.e. the contract proper between the parties which is solely contained within the "box"on the face of the ticket (The Majestic, 166 U.S.375,385; Silvestri-v-"Italia" etc., 388 F.2nd,11(2CCA)1968, Friendly,Ch.J.); Owens -v- "Italia" etc., 334 N.Y.Supp.2,789, affd. 347 N.Y.Supp.2,431, (App/Br.pp.10-11); The Kungsholm, 86 F.2, 703, (App/Br.pp.9,12,23,29); Maibrunn-v-Hamburg-American S.S.Co.77 F.2,304, (App/Br.pp.9,13,23); Bellachia-v-Italia Flotte, 84 F.2,975,(App/Br. pp.9,14,29); Baer-v-N.German Lloyd, 72 F.2,88,(App/Br.pp.9,14,29)

Furr-v- Societa Italia, 164 Fed.Supp.645,(App/Br.p.15); Stapp-v-Italia, 181 Fed.Supp.581,(App/Br.p.20); The Cretic,224 Fed.216, (App/Br.p.20); Horvath-v-Cunard,103 Fed.Supp.356,(App/Br.p.21): The Leviathan, 72 F.2nd,286,(App/Br.p.16); Baron-v- Compagnie,etc. 108 F.2nd.21-CCA2-(App/Br.p.15); Foster -v- Cunard,121 F.2nd 12 (App/Br.(App/Br.16); Reichman-v-Compagnie, etc.290NY344,349, (App/Br.p.17) ; Siegelman-v-Cunard,221 F.2nd,189(2CCA-1955), (App/Br.p.17); Weinberger-v-Compagnie, etc.146 Fed.516,(App/Br.23); Murray -v- Cunard,235 NY 162(App/Br.pp.15,18) then this Court will realize where it deviated from the accepted doctrine of the Supreme Court of the United States (The Majestic,supra) and the prior concurrent decisions of this Circuit ("Baer", "Baron","Bellachia", "McCaffrey","Maibrunn","Furr","The Kungsholm","The Leviathan", "Siegelman", all supra) that it is the "box" and the "box" alone which constitutes the contract. Notices alongside,on the back , on the overpage merely are legends or notices and are not binding upon the passenger (The Majestic, "The Kungsholm", "Maibrunn", "Baer","Stapp","Weinberger", all supra; LaBourgogne,144 F.781(2CCA) The Minnetonka,146 F.509(2CCA);Smith-v-N.German Lloyd,151 F.522(2CCA); and incorporation by reference has been denied.

Legends or notices on the cover certainly stand in less sharp focus and visibility than those printed alongside or underneath the "box" which have been previously rejected by so many panels of this Circuit and the Supreme Court of the United States.

Legends on the face of the ticket incorporating by reference terms and conditions printed elsewhere in the passage booklet have been sustained where by type size, color, format and composition they have been all that the carrier could reasonably

do to inform and warn the passenger of their existence have been uniformly sustained. I do not argue against this position or statement of law. But where the legend purporting to incorporate by reference has been so miniscule and microscopic as to be absolutely unreadable and unlocatable the Courts of two jurisdictions have unalterably rejected incorporation.(Silvestri-v-"Italia"etc.supra, Owens-v-"Italia"etc.,supra; "Furr-v-Societa Italia,supra.)

Apparently the Court below and this Circuit panel have been mistakenly influenced by the colorful cover of the passage booklet printed in no less than five overlapping colors (white, red, black, blue and green. See Appellee's Brief,p.16) Yet just this very confusion of color and print arrangement does not take the passage booklet out of the rule of law that incorporation by reference must be adequately contained in the "box" on the ticket face. The typeset of the cover is in no greater legal position than rubrics or legends contained alongside or underneath the "box" on the face of the ticket. The cover cannot substitute for the required notice within the "box"on the face of the ticket. This very Circuit has adjudicated that the notice on the face of the ticket(concededly the same as the "Silvestri" and "Owens" ticket) has been inadequate as a matter of law to warn and inform the passenger of other terms and conditions printed elsewhere, (Silvestri-v-"Italia,etc. supra, Owens-v-"Italia",etc.,supra.)

Since the purported rubric on the face of the ticket in the "box" has been declared judicially inadequate can any form of substitute printed elsewhere be judicially upheld ? The long line of cases previously cited reject this contention forcibly.

The Court is respectfully referred to Baer-v-N. German Lloyd,supra,(App/Br.p.14) where conditions not referred to in the ticket proper were rejected by this Circuit. The totally inadequate notice in the "McQuillan,"Silvestri" and "Owens" tickets categorizes them as having no notice whatsoever and squarely in the Majestic,supra doctrine and its progeny.

POINT II

SUMMARY JUDGMENT SHOULD BE DENIED WHERE A BONA FIDE MATERIAL ISSUE OF FACT EXISTS: WHERE A THE SLIGHTEST DOUBT EXISTS AS TO A TRIABLE ISSUE OF FACT: AND WHERE THE MOVING PARTY HAS NOT SUSTAINED THE BURDEN OF SHOWING THERE ARE NO ISSUES OF FACT REQUIRING A TRIAL.

The question of the sufficiency of notice purportedly incorporated on the ticket face in the "box" is one left for the trier of the facts.(McCaffrey-v-Cunard, supra)(App/Br.pp.19,26,29).

If herein the defendant-appellee relies upon the printing on the cover to charge the passenger with notice of the purported terms and conditions he has the burden of showing that they were distinctly brought to the passenger's knowledge,(Baer-v-N.German Lloyd,supra,(App/Br.p.9,14,29); Stapp-v-Italia,supra, (App/Br.p.20).

If defendant-appellee relies upon the passenger having implied or constructive knowledge of the purported contract provisions the burden is upon him to so prove,(Azrak-v-Panama Canal Co.117 Fed.Supp.334,(App/Br.p.24); The Kungsholm,supra).

The extreme remedy of summary judgment should only be employed where there is not the slightest scintilla of merit to the opponent's claim; where there are only issues of law to be determined; where the facts are undisputed and the truth is clear and there is no room for controversy under any discernable circumstances (App/Br.p24 et seq). The question of sufficiency of notice of the rubric in the "box" on the face of the ticket is one that should be left for the ultimate triers of the fact, the jury. (McCaffrey,supra; Stapp-v-Italia,supra)

Without contradiction the foregoing rule of law has been universally applied in all the Federal jurisdictions and the many various Circuit Courts of Appeal (App/Br. p.24 et seq). The same rule has been clearly enunciated and applied in the New York Court of Appeals (Sillman-v-20th Century Fox,3 NY2-395,404; DiMenna & Sons-v-City of New York, 301 NY 118).

Trial by affidavit has been frowned upon by the Courts and the opportunity of a litigant to have his day in Court has always had the approbation of the judiciary. This is particularly so in the instant case where the plaintiff has been imposed upon by a "contract of adhesion" and the significant issue before this Circuit is whether the carrier has done all that he reasonably could do to warn McQuillan of the purported incorporation by reference.

This Circuit has so frequently repudiated rubrics or legends of incorporation by reference, in following the doctrine of The Majestic,supra, as to compile a solid body of case law on the subject, that to permit the judgment of the District Court to stand would in legal effect amount to an overturning of The Majestic

doctrine and the learned opinion and decison in Silvestri-v-"Italia" etc.,supra, and the many decisions handed down through the years. Where so many different Benches of this Circuit have all spoken out in support of The Majestic doctrine it well merits the deep consideration of this Court sitting EN BANC to adjudicate the issues concerning passenger ticket contracts so frequently recurring in the Courts.

POINT III

DEFENDANT IS ESTOPPED BY ITS CONDUCT FROM CLAIMING THE PROTECTION OF ITS PURPORTED TIME LIMITATION CLAUSE.

"Italia"etc., had engaged in a correspondence with McQuillan and his attorney which can only be regarded as lulling them into a sense of security and unawareness that a purported time limitation clause existed and that defendant would ultimately spring its surprise trap after the passage of one year.

Plaintiff was asked to forward "finalized bills" when "in the opinion of the treating physician" he would"have finished undergoing treatment" (Rec/App.Doc.13,Ex.M-1). In the same letter it reserved it right to have their own physician examine McQuillan.

Never had defendant mentioned reliance upon such time limitation clause, although being very meticulous to insert statements that such transactions between the parties were "without prejudice" and"must not be construed as an admission of liability".

Whether such conduct on defendant's part constitued an estoppel is a question of fact for the jury, the ultimate trier of the facts, and should not be decided by trial by affidavit.

CONCLUSION

THE PETITION FOR RE-HEARING SHOULD BE GRANTED AND UPON SUCH RE-HEARING THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED; OR IN THE ALTERNATIVE THIS APPEAL SHOULD BE HEARD BY THIS COURT SITTING EN BANC.

I respectfully submit that this Court has overlooked or misapprehended the many points of fact and citations of authority pointed out in Plaintiff-Appellant's original brief on appeal and in the instant petition. If we "keep our eye on ball", that it is the "box" on the face of the ticket, which alone constitutes the passage contract between the parties, it will become readily apparent with great clarity that defendant "Italia,etc." has once again run afoul of the doctrine of The Majestic and failed to properly incorporate by reference a valid and enforceable time limitation clause.

Again, "following the ball", the carrier must do all that it reasonably can do to warn the passenger by a rubric or legend within the "box" on the face of the ticket printed in such a manner as to be readily apparent to the passenger. The microscopic printing on the face of the McQuillan ticket being of the same size, type and format as in the tickets previously rejected in "Silvestri" and "Owens",supra, this Court should maintain uniformity with its prior decisions and the Supreme Court of the United Staes and once again reject the ticket herein.

Respectfully submitted,
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United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of May one thousand nine hundred and seventy-five

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

WILLIAM McQUILLAN,

Plaintiff-Appellant,

-against-

"ITALIA" SOCIETA PER AZIONE DI NAVIGAZIONE,

Defendant-Appellee.

No. 75-7012

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Werker, reported at 386 F. Supp. 462.

Wilfred Feinberg

Wm H. Timbers

Ellsworth A. Van Graafeiland

U.S.C.JJ.

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MAY 22 1975

KIRLIN, CAMPBELL & KEATING